SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 758

HARRY P. LOCKLIN and ELMER J. BRANT, general partners doing business under the firm name of Radiant Color Company,
Petitioners,

vs.

SWITZER BROTHERS, INC., ROBERT C. SWITZER and JOSEPH L. SWITZER,
Respondents.

PETITION FOR THE WRIT OF CERTIORARI
to the United States Court of Appeals for the Seventh Circuit

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Most respectfully, petitioners pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 30, 1961.

CITATIONS TO OPINIONS BELOW

The judgment of the District Court was entered without opinion. The opinion of the Court of Appeals, printed in Appendix A, is reported in 297 F. 2d 39.

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1961 (Appendix B). Jurisdiction of this Court is invoked under U.S. Code, Title 28, Section 1254(1).

QUESTION PRESENTED

This is a civil private antitrust action in which respondents have been found guilty of a *per se* violation of the antitrust laws by tying the right to use patents to the use of a trademark. It was found that the trademark became, as a result of respondents' unlawful conduct, vested with an artificial value over and above the normal incidents of good will.

The question presented is whether, under such circumstances, the District Court should enjoin further use of the misused trademark.

STATUTORY PROVISIONS INVOLVED

The question is presented on that portion of U.S. Code, Title 15, Section 26, which recites:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . .

against threatened loss or damage by a violation of the antitrust laws . . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . . ."

STATEMENT OF THE CASE

Petitioners and respondent, Switzer Brothers, Inc., are competitors in the manufacture and sale of daylight fluorescent materials. Respondents, Robert C. Switzer and Joseph L. Switzer, are officers and directors of respondent, Switzer Brothers, Inc. Hereinafter, for convenience, the name Switzer is used to denote Switzer Brothers, Inc., and the term respondents is used to denote the respondents collectively.

The courts below concurrently held that respondents violated the antitrust laws and they granted petitioners injunctive relief and an accounting of their damages.

Both courts found that Switzer marked its products only through a pyramid of licensed manufacturers and dealers employing its fluorescent materials. Switzer was "the apex of the pyramid, superimposed above at least eight licensed manufacturers of daylight fluorescent materials, licensed dealers in all parts of the United States and more than 4,000 end-use manufacturers who composed the base of the pyramid." (Opinion, App. iii.)

Switzer adopted the trademark "Day-Glo" in marketing its fluorescent materials. The licensed manufacturers agreed "that they would market all fluorescent materials

manufactured by them under the Day-Glo mark". The licensed dealers agreed "that they would deal only in daylight fluorescent materials which carried the Day-Glo mark". Finally, the more than 4,000 end-use manufacturers agreed "that they would use the trademark Day-Glo on all end-use devices manufactured" by them. (Opinion, App. iv.)

Switzer also controlled patents in the daylight fluorescent field and, except for certain label licenses, granted no licenses under the patents except those containing provisions summarized above. (Opinion, App. v.) The grant of a license under the patents was conditioned upon the licensees accepting the Switzer Day-Glo trademark. (Opinion, App. ix.)

Switzer took the position that every fluorescent display which was not marked with the Day-Glo trademark was an infringement of the patents. (Opinion, App. x.) Switzer, beginning in early 1949, charged non-licensees and all users of non-licensed displays with patent infringement and, beginning in latter 1949, threatened them with patent infringement suits. Both measures employed advertisements and news releases in trade papers, letters and oral communications. Respondents commenced suits in widely scattered parts of the United States against unlicensed dealers, end-use manufacturers, and users of such devices. All of this activity was found to be in furtherance of Switzer's licensing program. (Opinion, App. v-vi.)

Petitioners contended below, and do here contend, that the judgment should have prohibited Switzer from making further use of the trademark Day-Glo in the manufacture and sale of daylight fluorescent materials (Opinion, App. xviii):

> "... Appellee argues that the record reveals that the demand for 'Day-Glo' marked goods was induced, in part, by fear and not by the usual elements of good will which establishes a trademark. That argument refers to advertisements and representations by Switzer, made in furtherance of its scheme to monopolize the trade, that Day-Glo is 'The Mark of Legality in Daylight Fluorescence'; that 'The Law is on your Side' when you call for Day-Glo; and that absence of the Day-Glo mark upon fluorescent materials and advertising devices would subject the manufacturer and user to an action for patent infringement. Finally, appellee argues that the mark has an artificial value arising out of appellants' unlawful, coercive conduct which appellants will continue to realize, if permitted, to use the mark, because of public identification of the mark as the only lawful mark in the daylight fluorescence industry."

The Court of Appeals held (Opinion, App. xviii-xix):

> "In the light of the whole record, it seems apparent that the 'Day-Glo' trademark became, as a result of appellants' unlawful conduct, vested with an artificial value in the fluorescence field over and above the normal incidence of good will. To that extent, appellee's argument does possess logical persuasiveness.
>
> "Something more than logical persuasiveness, however, must be shown before a reversal of the court's decision is required. ..."

Petitioners, in support of their argument, relied upon divestiture cases of this Court[1] on the theory that there

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[1] *United States v. du Pont & Co.* (1961), 366 U.S. 316; *International Boxing Club v. U.S.* (1959), 358 U.S. 242, 253; *United States v. Paramount Pictures* (1948), 334 U.S. 131, 171; and *Schine Theatres v. United States* (1948), 334 U.S. 110, 128-129.

was an analogy between the mandatory injunctive relief of a divestiture case and the prohibitory injunctive relief sought in the case at bar.

The Court of Appeals held that petitioners were not entitled to the relief for which they prayed largely because of "the drastic nature of the remedy suggested"; because "divestiture as a remedy in private antitrust litigation should be even more narrowly proscribed" than it is in conspiratorial combines and because it "found no reported case of the Supreme Court which would authorize divestiture as a remedy in the situation at hand" (Opinion, App. xix-xx).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law[2] which has not been, but should be settled by this Court. [Rule 19, Section 1(b).] The Court of Appeals denied the injunctive relief which petitioners sought, in part, because "We have found no reported case of the Supreme Court which would authorize divestiture as a remedy in the situation at hand, and we could not require divestiture in the absence of convincing reasons why that remedy is necessary to prevent continued violations of the antitrust laws." (Opinion, App. xx.)

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[2]That this is not an isolated instance is made clear by such cases as *Cott Beverage Corporation v. Canada Dry Ginger Ale* (S.D.N.Y. 1956), 146 F.Supp. 300, 302-303, appeal dismissed as premature (2 Cir. 1957), 243 F.2d 795; *American TCP Corp. v. Shell Oil Co.* (S.D.N.Y. 1954), 123 F.Supp. 55; *U.S. v. Wallace & Tiernan Co., Inc.* (D.R.I. 1954), 1954 CCH Trade Cases, ¶67,828, at pp. 69,687-8; and *U.S. v. A. B. Dick Co.* (D.Ohio 1948), 1948-1949 CCH Trade Cases, ¶62,233 at pp. 62,360-1.

Yet, the Court of Appeals did find "logical persuasiveness" in petitioners' argument. (Opinion, App. xix.)

Petitioners submit that in the absence of injunctive relief, Switzer is bound to reap in the future the harvest of its illegal conduct in the past. It is self-evident that members of the public who are not sophisticated enough to realize that "Day-Glo" is no longer "The Mark of Legality" will continue to call for "Day-Glo" to protect themselves from respondents' aggression. An ordinary member of the general public calling for Day-Glo over the counter could not be expected to keep abreast the legal status of the mark. Clearly, an assessment of damages is inadequate to compensate petitioners for future sales which will be lost by them to respondents as a result of past coercion. Indeed, it would be almost impossible accurately to measure such damages.

To the extent that customer inertia engendered for the "Day-Glo" trademark continues, there is a "threatened loss or damage by a violation of the antitrust laws" for which petitioners are entitled by statute to injunctive relief. [U.S. Code, Title 15, Section 26.]

2. In treating "the drastic nature of the remedy suggested" the Court of Appeals misconceives the limited nature of the property rights of a trademark proprietor. The monopoly of a trademark "deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care." [*Bourjois & Co. v. Katzel* (1923), 260 U.S. 689, 692.] Petitioners submit that a trademark is not "protected with corresponding care" when its owner uses it

as "The Mark of Legality in Daylight Fluorescence" to police an illegal combination.

If a trademark proprietor loses his right to claim the assistance of a court of equity by misrepresenting either the nature of his goods or the source of origin of the goods [*Worden v. California Fig Syrup Co.* (1903), 187 U.S. 516; and *Manhattan Medicine Co. v. Wood* (1883), 108 U.S. 218], then the slight step forward of enjoining the continued use of a mark which has gained public acceptance by virtue of coercive measures in violation of the antitrust laws should not be deemed to be a drastic remedy.

In government antitrust actions, this Court has held that divestiture of ill-gotten gains is essential because it deprives "the antitrust defendants of the benefits of their conspiracy" [*Schine Theatres v. United States* (1948), 334 U.S. 110, 128; followed in *International Boxing Club v. U.S.* (1959), 358 U.S. 242, 253, and *United States v. du Pont & Co.* (1961), 366 U.S. 316, 329.] The same principle of law is inherently invoked in such consent decree trademark divestiture cases as *U.S. v. Wallace & Tiernan Co., Inc.* (D.R.I. 1954), 1954 CCH Trade Cases, ¶67,828, at pp. 69,687-8; and *U.S. v. A. B. Dick Co.* (D. Ohio 1948), 1948-1949 CCH Trade Cases, ¶62,233, at pp. 62,360-1.

To enjoin further use of the mark on the facts found in this case deprives respondents of nothing other than their ill-gotten gains. It only requires that they "restore" to the public commons "what they unlawfully obtained" by virtue of their conduct. [*United States v. Paramount Pictures* (1948), 334 U.S. 131, 171.] It is indeed a simple matter for respondents to select a new and unsullied mark

and to compete fairly in the market in the promotion of sales under the new mark.

3. In placing a private antitrust case in which the violations stem from the activities of a single supplier of fluorescent materials and its officer-stockholders in a more narrowly proscribed category than government antitrust cases involving conspiratorial combines of large economic forces, as the Court of Appeals does at App. xix-xx of its opinion, that Court unduly limits the scope of U.S. Code, Title 15, Section 26. Such a restriction on the rights of the private litigant is in conflict in principle with *Radovich v. Nat. Football League* (1957), 352 U.S. 445. There this Court held (p. 454) that it "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

4. This Court should take jurisdiction of this petition because "The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial." [*United States v. du Pont & Co.* (1961), 366 U.S. 316, 323.]

For the reasons stated, petitioners pray that this petition be granted.

Dated, February 26, 1962.

Respectfully submitted,

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Attorneys for Petitioners.

(Appendices Follow.)

Appendix A

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1961. SEPTEMBER SESSION, 1961

Nos. 13,193 and 13,194

SWITZER BROTHERS, INC., Robert C. Switzer and Joseph L. Switzer, *Counter-Defendants, Appellants and Cross-Appellees,*

vs.

HARRY P. LOCKLIN and ELMER J. BRANT, general partners doing business under the firm name of Radiant Color Company, *Counter-Plaintiffs, Appellees and Cross-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 30, 1961

Before SCHNACKENBERG and KILEY, *Circuit Judges*, and MERCER, *District Judge*.

MERCER, *District Judge*. Appellant, Switzer Bros., Inc., Robert C. Switzer and Joseph L. Switzer, appeal from a judgment granting injunctive relief to appellee and ordering appellants to render an accounting on account of vio-

lation of 15 U.S.C. §§ 1, 2 and 14. Harry P. Locklin and Elmer J. Brant, d/b/a Radiant Color Company, prosecute a cross-appeal, contending that the court below erred in failing to enjoin appellants from continuing to use the registered trademark, "Day-Glo", in the marketing of daylight fluorescent materials.

Hereinafter, for convenience, the name Switzer, is used to denote Switzer Brothers, Inc., the term appellants is used to denote Switzer, Robert C. Switzer and Joseph L. Switzer, collectively, and the term appellee is used to denote Radiant Color Company.

Switzer, an Ohio corporation which is wholly owned by the individual appellants, Robert C. and Joseph L. Switzer, is engaged in the manufacturing and selling of daylight fluorescent materials, which it markets in interstate commerce under the registered trademark "Day-Glo". At all times since January 1, 1949, appellee has been a competitor of Switzer, manufacturing and marketing daylight fluorescent materials in interstate commerce under the trade name, "Velva-Glo."

The cause was tried upon appellee's counter-claim for injunctive relief and treble damages in which it was alleged that appellants had attempted to monopolize the fluorescent materials market in violation of the antitrust laws, and appellants' counter-claim against appellee alleging antitrust violations and unfair competition.[1]

[1]The action was originally commenced by appellants as a patent infringement suit against a number of appellee's customers who are engaged in making and marketing daylight fluorescent advertising displays. Appellee intervened on behalf of its customers and filed answers to the complaint. Pursuant to the mandate of this court, *Switzer Bros. v. Locklin*, 7 Cir., 207 F.2d 483, appellee filed its

After a trial which lasted for some three weeks, the District Court entered voluminous findings of fact, about some of which the principal issues for decision revolve. The findings are summarized, generally, to the extent deemed necessary to an understanding of the issues, before specific contentions against the findings are treated in relationship to the applicable law.

Daylight fluorescent materials are pigments, liquid colors and coated paper and cardboard which produce brilliant color effects through the phenomenon of fluorescence in response to the visible light of day. End-use products in which such materials are employed include signalling, novelty and advertising devices.

Switzer is the assignee of various patents relating, insofar as here pertinent, to the production of daylight fluorescent devices and displays. Switzer is also the owner of the registered trademark "Day-Glo" which it employs in marketing its fluorescent materials. At all times material to this cause, Switzer marketed its products only through a pyramid of licensed manufacturers and dealers employing such materials. Switzer is, as the court found, the apex of the pyramid, superimposed above at least eight licensed manufacturers of daylight fluorescent materials, licensed dealers in all parts of the United States, and more than 4,000 end-use manufacturers who composed the base of the pyramid.

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counter-claim under the antitrust laws. The patent infringement complaint was subsequently dismissed, and that judgment was affirmed. *Switzer Bros. v. Chicago Cardboard Co.*, 7 Cir., 252 F.2d 407. The cause was then tried upon the issues raised under the antitrust laws.

Under contracts with Sherwin-Williams Company and other manufacturers of pigments, papers and inks, Switzer licensed each manufacturer to use the Switzer patents upon consideration of the manufacturers' agreements that they would market all fluorescent materials manufactured by them under the Day-Glo mark and would sell such materials only to Switzer licensed dealers and end-use device manufacturers. The manufacturers were authorized, with Switzer's approval, to enter into licensing agreements with dealers and end-users.

Switzer, and its licensed manufacturers, entered into contracts with a number of dealers, under which such dealers were licensed to sell Day-Glo materials, upon the dealer's agreement that they would deal only in daylight flourescent materials which carried the Day-Glo mark and were obtained from Switzer or other sources authorized in writing by Switzer to produce fluorescent materials; that they would sell such material only to Switzer licenses; and that they would not compete with Switzer or with other authorized sources of Day-Glo materials. These dealers, also with Switzer's approval, were authorized to enter into agreements with end-use manufacturers, licensing such manufacturers to use the Switzer patents.

Finally, agreements were made with the more than 4,000 end-use manufacturers under which they were granted a license to manufacture fluorescent end-use devices under the Switzer patents upon their agreement that they would use the trademark Day-Glo on all end-use devices manufactured and that they would buy their fluorescent materials only from Switzer or from other

sources approved in writing by Switzer as a supplier of such materials.

Each agreement in the first and last-mentioned categories required the payment to Switzer of royalties, measured by a percentage of volume of business.

No licenses under the Switzer patents were granted to any end-use manufacturer, except under the licensing agreements hereinabove summarized, and except under label licenses adopted in 1952 which granted to purchasers of Day-Glo materials a royalty-paid license to use "only" the purchased materials in devices covered by the Switzer patents.

All materials manufacturers' licenses, all end-use manufacturers' licenses and all label licenses referred specifically to Switzer patents 2,417,384 and 2,475,529 relating to the manufacture of daylight fluorescent devices. The court found, and that finding is not challenged, that the daylight fluorescent materials manufactured by Switzer and its licensees have substantial non-infringing uses not defined in any claim of those patents.

Beginning in early 1949, Switzer charged non-licensees and all users of non-licensed displays with patent infringement through advertisements and news releases in trade papers and through letters and oral communications. Beginning in latter 1949, the same media and methods were employed to threaten all non-licensed manufacturers and all users of non-licensed devices with patent infringement suits. Suits were commenced in widely scattered parts of the United States against unlicensed dealers in daylight fluorescent materials, manufacturers of end-use devices

and users of such devices. Two of those suits, including the instant case, were instituted against appellee's customers. The court found that all of this activity was done in furtherance of Switzer's licensing program.

Appellee was in the target area of Switzer's campaign. Switzer licensees and others were advised that appellee's "Velva-Glo" materials were infringements of Switzer's patents. Appellee's customers were threatened with suit, and ultimately some of them were actually sued. The last was done, as the court found, to deter consumers and prospective consumers from purchasing fluorescent materials produced by appellee.

The court found that the Switzer publications and threats were unauthorized because they purported to claim a monopoly in the whole field of daylight fluorescent displays, were excessive, as Switzer should have known, and were not followed promptly by litigation against all of those to whom they were directed.

Finally, the court found that the Switzer licenses have the effect of lessening competition and creating a monopoly in daylight fluorescent materials, that the individual appellants participated in the illegal acts, that appellee was damaged in respects to be hereinafter noted, that an injunction should issue and that appellants should account to appellee in treble damages as determined by a subsequent accounting.

By its judgment order the court decreed that appellants had misused the Switzer patents and the Day-Glo trademark in restraint of trade in interstate commerce in violation of the antitrust laws. 15 U.S.C. §§ 1, 2, 14. An

injunction was ordered restraining appellants and each of them:

(a) from granting any license to use the combination claimed by said Switzer patents 2,417,384 and 2,475,529, where such licensed use is directly or indirectly conditioned on purchasing or otherwise obtaining only from Switzer Brothers, Inc., or from sources designated by it, any daylight fluorescent materials to be used in such combination, but not patented by such patents;

(b) from selling or offering to sell any daylight fluorescent materials, with an undertaking or understanding that the purchaser will be granted the right to use the combination claimed in said Switzer patents on condition that such daylight fluorescent materials, unpatented with respect to said patents, shall be purchased only from Switzer Brothers, Inc., or from a source designated by it;

(c) from in any way discriminating in the granting of licenses to use the combination claimed in said Switzer patents, in favor of users or proposed users of such combination who purchase daylight fluorescent materials therefor from Switzer Brothers, Inc., or from a source directed by it, and against such users or proposed users who purchase such daylight fluorescent materials from any other sources;

(d) from so using said Switzer patents as to tend to create a monopoly in daylight fluorescent materials not patented by such patents, or in any way, directly or indirectly, misusing such patents, in violation of the anti trust laws of the United States, particularly United States Code, Title 15, Sections 1, 2, and 14;

(e) from bringing suit against or in any way threatening the customers of Radiant Color Company with suits for alleged infringement of said Switzer patents on account of the sale and use of daylight fluorescent materials which have been obtained from Radiant Color Company and are not embraced by the claims of said patents;

(f) from making representations that the Switzer patents cover fluorescent materials produced by Radiant Color Company, or devices made from such materials, which are not embraced by the claim of said patents.

The decree also referred the cause to a special master to take and report on accounting of appellee's damages.

Appellants' principal contention for reversal is that Switzer's licensing policy and appellants' practice thereunder was not a violation of the antitrust laws, but was a lawful business practice legitimately pursued. Since the trial court entered findings opposed to that contention, the issue resolves itself into the question whether the findings of fact leading to the judgment that the antitrust laws were violated are supported by the record.

We reject at the outset appellants' contention that we are concerned only with construction of written contracts, and therefore Rule 52 (a), Fed. R. Civ. P., 28 U.S.C.A., does not apply. The basic licenses used by appellant tie the right to the use of patents to the use of the Day-Glo trademark, and both to the exclusive use of Switzer produced, or Switzer approved materials. The combination thereof is, *per se*, a violation of the antitrust laws, *International Salt Co. v. United States*, 332 U.S. 392; *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20; unless the evidence requires a finding that the unique

circumstances of the industry required adoption of a tie-in program, otherwise unlawful, as a legitimate business practice. *E.g., United States v. Jerrold Electronics Corp.*, E.D. Pa., 187 F. Supp. 545, aff'd *per curiam*, 365 U.S. 567. Thus, the issue is one to be determined from the record evidence of Switzer practices. That issue depends upon a voluminous record, composed of testimonial and exhibit evidence. Rule 52 (a) is particularly applicable to such a record. *International Boxing Club v. United States*, 358 U.S. 242, 252; *Timken Co. v. United States*, 341 U.S. 593, 596-97; *Milwaukee Towne Corp. v. Loew's Inc.*, 7 Cir., 190 F. 2d 561, 564-65, cert. denied 342 U.S. 909.

Upon the question whether the findings are supported by the record, the license agreements themselves support the monopoly findings. The patent licenses were conditioned upon the use of the Day-Glo mark. From Switzer, at the apex, to the more than 4,000 end-use manufacturers at the base of the pyramid of Switzer control established by the licenses, all were required to place the Day-Glo trademark upon all raw materials and end-use devices produced. Each licensee agreed, as a condition of the license, that only materials manufactured by Switzer or approved by it in writing might be used in the production of fluorescent displays. Switzer's licensed manufacturers and dealers were enjoined by their license agreements not to sell to any person other than Switzer licensees.

The evidence apart from the licenses reveals that Switzer refused to sell fluorescent materials to persons other than its licensees, and that no materials were ever approved for use by its licensees except materials pro-

duced by manufacturers who held a Switzer license. Appellants' argument that non-licensed materials which met Switzer quality standards would have been approved after testing by Switzer is refuted by Switzer correspondence conditioning approval upon acceptance of a Switzer license and the payment to Switzer of royalties.

There is ample proof that appellants made excessive and reckless claims of patent infringement in the furtherance of their licensing program. Their patents were limited to certain end-use, combination devices and appellants do not challenge the finding that the basic fluorescent materials had substantial non-infringing uses. Yet, the patents were asserted by appellants as a monopoly on all fluorescent materials and all daylight fluorescent displays. This is demonstrated by evidence of Switzer's position that every fluorescent display which was not marked with the Day-Glo trademark was an infringement of its patents.

The record amply supports the finding and conclusion that the Switzer licensing program was conceived and employed to foster a Switzer monopoly in the daylight fluorescent industry. The licenses required, as a condition for the grant thereof, that the licensee purchase all materials from Switzer, or sources approved in writing by it, not only for production of the patented devices, but also for the production of all daylight fluorescent devices. The grant of the patent license was also conditioned upon the licensees accepting the Switzer Day-Glo trademark. These are precisely the type of tie-in schemes which have been frequently condemned by the Supreme Court. *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827,

830-32; *International Salt Co. v. United States*, 332 U.S. 392; *Mercoid Corp. v. Minneapolis-Honeywell Reg. Co.*, 320 U.S. 680; *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661; *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436; C.f., *Northern Pacific R. Co. v. United States*, 356 U.S. 1; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131.

Appellants attempt to justify their licensing program and activities in furtherance thereof by reference to the principles applied in *United States v. Jerrold Electronics Corp.*, E.D. Pa. 187 F. Supp. 545, aff'd *per curiam*, 365 U.S. 567, and *Dehydrating Process Co. v. A. O. Smith Corp.*, 1 Cir., 292 F. 2d 653. They urge upon us evidence that appellants had suffered a disastrous experience in Canada from uncontrolled sales of fluorescent materials, and that their licensing program in United States marketing was designed to permit control of the quality and method of use of the materials in order to forestall a repeat of the Canada fiasco.

Appellants' position is without merit. The trial court rejected the evidence now urged upon us, and its failure to enter findings with respect thereto is tantamount to findings adverse to appellants upon the evidence. *Container Patents Corp. v. Stant*, 7 Cir., 143 F. 2d 170, 172, cert. denied 323 U.S. 734. Furthermore, the findings entered by the court imply its rejection of the argument now asserted. Even upon the unsatisfactory presentation here,[2] we are convinced that those findings are unassailable.

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[2]The transcript of the trial comprises almost 4,000 pages of testimony. The appendix presented by appellants is composed of skimpy excerpts from that mass of testimony, and it falls far short

Therein is found a basic point of distinguishing this cause from the *Jerrold* and *Dehydrating* cases. In each of those cases, the trial court found that practices, presumptively in violation of the antitrust laws, were, in fact, a legitimate exercise of business practice. Here, by contrast, the court found upon conflicting evidence that appellants' activities were unlawful both *per se* and in fact. That finding is unassailable in this court unless it is demonstrated to be clearly erroneous. Fed. R. Civ. P. 52 (a), 28 U.S.C.A.

An analysis of *Jerrold* and *Dehydrating* discloses, also, that each is inapposite factually to the case at bar. Jerrold was a new business, pioneering the development of a master television antenna, designed to pick up television signals at a central tower for transmission and distribution by cable to whole communities which were out of the range of normal television reception. Its first sales of equipment were made on an experimental basis before the system was perfected, with Jerrold agreeing to furnish without further charge such new equipment and modifications of equipment as experimental use of the installations might prove to be necessary. Thereafter, Jerrold, who manufactured only parts of the total system, sold its equipment only on a full-system basis, with the buyer agreeing that he would buy only equipment approved by Jerrold for repairs or expansion of the system and with the buyer accepting a compulsory service contract under which the equipment would be

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of the intendment of our Rule 16(b), 28 U.S.C.A. We have not resolved the appeal upon the basis of the Rule, see *A. O. Smith Corp. v. Pre-Fab Transit Co.*, 7 Cir., 287 F.2d 210, because the appendices presented show beyond doubt that the findings of the court below are sustained by the evidence.

serviced by Jerrold engineers. The court characterized the tie-in arrangements as, *per se*, unreasonable, but held it to be a legitimate business arrangement at its inception, for the reason that Jerrold was pioneering a new technology, not then perfected, which was likely to succeed and gain public acceptance only if control of the equipment were retained by Jerrold who was familiar with the technological limitations and problems involved. The court held, however, that continuation of the tie-ins by Jerrold after the system was perfected was an unreasonable restraint and a violation of the antitrust laws.

In the *Dehydrating* case, it was charged that the sales practice adopted by Smith of selling its patented silo-unloading device only for use in its own patented, glass-lined silo was a tie-in prohibited by the antitrust laws. Smith's unloader, installed inside at the bottom of a silo or storage bin, used a sweep arm to direct stored material from storage through a slot in the base of the silo or bin. Successful operation of the unloader required an unimpeded, gravity down-feed of the stored material onto the unloader. When the unloader was first marketed, it was sold by Smith without restriction as to its use. The tie-in policy was adopted some 7 years later, after 50% of Smith's customers, who had purchased the unloader for installation in silos other than Smith's, had complained of malfunctions resulting from construction characteristics of the silos which impeded the free gravity feed of material to the unloader.

The Court of Appeals stressed three points in affirming a judgment for Smith upon a directed verdict, namely, (1) that 50% customer dissatisfaction was substantial evidence of the reasonableness of Smith's policy of selling

the unloader only for use in its own silos, (2) that there was no evidence that anyone other than Smith manufactured a silo or storage bin with the specifications necessary for successful use of the unloader; and (3) that Dehydrating had not sustained the burden of proving any damage to it from Smith's sales practice.

As the court pointed out in the *Jerrold* case, a defendant claiming a business reason for tie-in sales, as opposed to an attempt to restrain trade, has the burden of proving the existence of facts necessary to support his claim. 187 F. Supp. at 560. The court below found, at least by implication, that appellants had not sustained that burden. We agree. There are no factors here present which are comparable to the facts of either *Jerrold* or *Dehydrating* which the courts there felt excused tie-in sales from censure.

The licenses used by Switzer are not properly characterized as trademark licenses as appellants would have us do. The quality-control provisions of the Lanham Act, 15 U.S.C. §§ 1051, *et seq.*, relating to trademark licenses, cannot be construed to condone a violation of the antitrust laws. *Timken Co. v. United States*, 341 U.S. 593, 599.

Section 371 (d) of Title 15, U.S.C., does not justify Switzer's label licensing program as appellants contend. That section applies to components of a patented combination which are "not a staple article or commodity of commerce suitable for noninfringing use." 15 U.S.C. 371 (c). Switzer's label licenses tied sales of its materials to the Switzer patents despite the fact that the materials were suitable for substantial noninfringing uses. The trial court found that the label licenses had the effect of re-

straining trade and fostering a Switzer monopoly in the daylight fluorescent industry. No reason is apparent of record to disturb that finding.

Indeed, appellants' argument on Section 271(d) depends largely upon a misconstruction of the statute, namely, that the Act constitutes a legislative vacation of the rule of the *Mercoid* and other cases that the monopoly of a combination patent extends only to the totality of the combination, and cannot be asserted as a monopoly upon the separate component elements of the combination. That rule was reaffirmed and applied in the recent case of *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 5 L. Ed. 2d 592, 598 (1961). That case removes all arguable validity of the contention now asserted.

One final contention of appellants upon the question of antitrust violations must be briefly mentioned. An antitrust suit filed by the United States against Switzer, Sherwin-Williams and others was terminated by a consent decree entered by the United States District Court for the Northern District of California on October 22, 1953. Appellants urge that decree in refutation of the findings that Switzer's licensing policies still have the effect of lessening competition in the fluorescence industry.

The consent decrees, entered without a trial of the issues in the government suit, enjoined enforcement of the tie-in features of Switzer's licenses and enjoined appellants from engaging in the type of conduct adjudicated in this case. Appellants argue that they have amended their ways in accordance with the restrictive provisions of that decree. On the other side of the blotter, however, the court below, after a trial of some three

weeks' duration, found that appellants were still violating the anti-trust laws and that appellants' licensing and trade policies still have the effect of lessening competition in the industry. We cannot say on the record before us that those findings are clearly erroneous.

Appellants next contend that the findings that appellee was damaged by appellants' illegal conduct are not supported by the evidence.

Appellants' attack is spearheaded by the argument that the evidence does not support finding 28 that the general public was damaged by appellants' conduct, by reason of the fact that the public was deprived of an opportunity to purchase fluorescent materials in a free market not affected by appellants' unlawful practice. We reject that argument upon the record, and we note, also, that the argument is specious even if the finding of public injury were not supported by the record. Congress has determined that public injury is inherent in every monopolistic practice or restraint of trade in violation of the Sherman Act, *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 211. In a treble damages action under the Clayton Act the statutory criteria for recovery are satisfied when a plaintiff has alleged and proved an unlawful restraint of trade and damage to himself growing out thereof. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656.

Appellants' argument that the evidence fails to show that appellee's loss of sales which is reflected by the record resulted from appellants' unlawful conduct is rejected for two reasons. First, we will not disturb the findings, made upon conflicting evidence, that appellee's sales were restricted as a result of the unlawful conduct. Secondly,

we think appellants' contention rests upon a misconstruction of the law which would make injury compensable under the antitrust laws only if the unlawful conduct found to exist stood alone as the causation of the injury. A violation of the antitrust laws is answerable in treble damages for injury to another by the unlawful act even though other factors may have contributed to the injury. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65; *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 566; *Momand v. Universal Film Exchanges*, 1 Cir., 172 F.2d 37, 43; *William Goldman Theatres, Inc. v. Loew's Inc.*, E.D. Pa., 69 F.Supp. 103, aff'd 164 F.2d 1021.

The court below found that both this suit and a suit in Ohio against appellee's customers were instituted in furtherance of Switzer's unlawful licensing program and that appellee's expenses incurred in defending its customers is an element of its damages. That finding is supported by the evidence and is correct in legal principle. *Clapper v. Original Tractor Cab Co.*, 7 Cir., 270 F.2d 616, 623-24, cert. denied 361 U.S. 967; *Kobe, Inc. v. Dempsey Pump Co.*, 10 Cir., 198 F.2d 416, 424-25, cert. denied 344 U.S. 837. Expenses incurred by appellee in counteracting Switzer's propaganda and threats to appellee's customers was also properly found by the court as an element of appellee's damages. Cf., *Maytag Co. v. Meadows Mfg. Co.*, 7 Cir., 45 F.2d 299, 302, cert. denied 283 U.S. 843.

We cannot say that the findings that appellee was damaged by appellants' unlawful conduct are clearly erroneous. The elements of damage found are supported by the record and are elements authorized by law. The reference of the case to a master for a determination of

the amount of damages is a proper procedure. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259.

We have considered other contentions of appellants, including the contention that the court erred in dismissing appellants' counterclaim. All are found to have no merit. In appeal No. 13193 the judgment is affirmed.

On the cross-appeal in No. 13194, appellee first contends that the court erred in failing to prohibit Switzer's further use of the trademark Day-Glo, in the manufacture and sale of daylight fluorescent materials. Appellee argues that the record reveals that the demand for "Day-Glo" marked goods was induced, in part, by fear and not by the usual elements of good will which establishes a trademark. That argument refers to advertisements and representations by Switzer, made in furtherance of its scheme to monopolize the trade, that Day-Glo is "The Mark of Legality in Daylight Fluorescence"; that "The Law is on your Side" when you call for Day-Glo; and that absence of the Day-Glo mark upon fluorescent materials and advertising devices would subject the manufacturer and user to an action for patent infringement. Finally, appellee argues that the mark has an artificial value arising out of appellants' unlawful, coercive conduct which appellants will continue to realize, if permitted to use the mark, because of public identification of the mark as the only lawful mark in the daylight fluorescence industry.

In the light of the whole record, it seems apparent that the "Day-Glo" trademark became, as a result of appellants' unlawful conduct, vested with an artificial value in the fluorescence field over and above the normal inci-

dence of good will. To that extent, appellee's argument does possess logical persuasiveness.

Something more than logical persuasiveness, however, must be shown before a reversal of the court's decision is required. Not the least of the considerations to be taken into account is the drastic nature of the remedy suggested. It seems to us that divestiture of property rights in a trademark, by injunction against the mark's continued use, is a remedy which would seldom commend itself to equity in a private suit under the antitrust laws for injunctive relief and treble damages. Even in the context of suits by the United States to restrain conspiratorial monopolies divestiture as a remedy is not without prescription. Thus it is stated that a decree should not penalize by divestiture under "the guise of preventing future violations," *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409, and that the harsh remedy of divestiture should not be employed whenever injunctive relief is adequate to prevent continued wrongdoing. *Standard Oil Co. v. United States*, 221 U.S. 1, 77; dissenting opinion of Mr. Justice Frankfurter, *United States v. du Pont & Co.*, 366 U.S. 316, 335-364. It seems certain to us that divestiture as a remedy in private antitrust litigation should be even more narrowly proscribed, especially in a case such as this where there is lacking a conspiratorial combine of giant economic units of industry[3] and in which the violations stem from the activities

[3]Examples of that type of situation in which divestiture was decreed, are *United States v. duPont & Co.*, 366 U.S. 316, *International Boxing Club v. United States*, 358 U.S. 242, *United States v. Paramount Pictures*, 334 U.S. 131, *United States v. American Tobacco Co.*, 221 U.S. 106, *Standard Oil Co. v. United States*, 221 U.S. 1, and *Northern Securities Co. v. United States*, 193 U.S. 197.

of a single supplier of fluorescent materials and its officer-stockholders.

Appellee attempts to support its position by its reference to cases involving conspiratorial combines of large economics forces adjudicated in government antitrust suits. *International Boxing Club v. United States*, 358 U.S. 242; *United States v. Paramount Pictures*, 334 U.S. 131; *United States v. Crescent Amusement Co.*, 323 U.S. 173. That reference assumes an analogy which does not exist. A distinction must be drawn between the conspiracy cases, in which divestiture as a remedy has been considered necessary to restore competition, and this case in which competition may be restored by injunction, and divestiture could only remove a residue of benefit which may yet enure to Switzer from its use of the Day-Glo mark.

We have found no reported case of the Supreme Court which would authorize divestiture as a remedy in the situation at hand, and we could not require divestiture in the absence of convincing reasons why that remedy is necessary to prevent continued violations of the antitrust laws.

It is apparent that the court below felt that continued violations of law could be prevented without enjoining the continued use of the "Day-Glo" trademark. Its decree was drafted accordingly, upon its finding that the excessive claims made by appellants of a monopoly in the fluorescence field were made in good faith without a conscious purpose to violate the antitrust laws. We cannot say that that finding is clearly erroneous or that the decree, formulated by the court to meet the adjudicated exigencies of the case, is not a valid exercise of the large discretion

with which the court was vested. *E.g., International Salt Co. v. United States*, 332 U.S. 392, 400-401; *United States v. du Pont & Co.*, 353 U.S. 586, 607-608.

Finally, appellee contends that finding 29 should be made more specific. The court found that appellee has been directly damaged by Switzer's licensing program in respects enumerated in that finding "and possibly in others." Appellee contends that the finding, as cast, is ambiguous, and that it should include a specific finding that appellants' unlawful practices forestalled appellee's normal growth in the industry.

We think it unnecessary to disturb that finding. The conclusions of law and the decree do not purport to limit the scope of inquiry upon the trial as to the amount of damages. The cause is referred to the master to ascertain and report an account of "the damages suffered." Since appellee is not restricted in the scope of its proof before the master, it has no cause to complain that finding 29 might have been more specifically cast.

The judgment is affirmed on both the appeal and the cross-appeal.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix B

In the United States Court of Appeals
for the Seventh Circuit

Chicago 10, Illinois

Thursday, November 30, 1961

Nos. 13,193 and 13,194

SWITZER BROTHERS, INC., Robert C. Switzer and Joseph L. Switzer, *Counter-Defendants, Appellants, and Cross-Appellees,*

vs.

HARRY P. LOCKLIN and ELMER J. BRANT, general partners doing business under the firm name of Radiant Color Company, *Counter-Plaintiffs, Appellees, and Cross-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Before Hon. ELMER J. SCHNACKENBERG, *Circuit Judge;* Hon. ROGER J. KILEY, *Circuit Judge;* Hon. FREDERICK O. MERCER, *District Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause, on both the appeal and cross appeal, be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 758.

HARRY P. LOCKLIN and ELMER J. BRANT,
general partners doing business under the firm name of
RADIANT COLOR COMPANY,

Petitioners,

vs.

SWITZER BROTHERS, INC., ROBERT C. SWITZER,
and JOSEPH L. SWITZER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS SWITZER BROTHERS, INC., ROBERT E. SWITZER AND JOSEPH L. SWITZER IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

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vs.

SWITZER BROTHERS, INC., ROBERT C. SWITZER,
and JOSEPH L. SWITZER,

Respondents.

BRIEF FOR RESPONDENTS SWITZER BROTHERS, INC., ROBERT E. SWITZER AND JOSEPH L. SWITZER IN OPPOSITION.

OPINION BELOW.

The judgment of the district court was entered without opinion, but the findings of fact, conclusions of law and judgment are reproduced in Appendix C hereto.* The opinion of the court of appeals is printed as Appendix A to the Petition and is reported in 297 F. 2d 39.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

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* Respondents' appendix filed in the Court of Appeals is referred to herein as "Appendix." The appendices attached to the Petition and this brief in opposition are referred to as Appendix A and B (to the Petition) and Appendix C (attached hereto).

QUESTION PRESENTED.

The question presented is whether the district court abused its broad discretionary power to fashion injunctive remedies for antitrust violations by refusing to enjoin the further use of a trademark which, the lower court concluded, had been misused in conjunction with two patents. The court of appeals held that such power had not been abused.

STATUTE INVOLVED.

The statute involved, 15 U. S. C. § 26, is adequately set forth in the Petition.

STATEMENT.

This is a treble damage antitrust case. The trial court concluded that the respondents (hereinafter called "Switzers") had misused two United States patents, No. 2,417,384 and No. 2,475,529 and the trademark Day-Glo*, in restraint of trade and in a way tending to create a monopoly in unpatented daylight fluorescent materials in violation of the antitrust laws. This decision was based on findings that Switzers had granted an exclusive or preferential right to use the combinations claimed by the patents to trademark licensees who obtained daylight fluorescent materials utilized therein from Switzers or from sources approved by Switzers, that non-licensees were threatened with patent infringement suits, and that patent infringement suits were brought in furtherance of the licensing program. The district court, however, specifically found that:

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* There was no specific finding of fact that the trademark had been misused.

"Switzer made the publications and threats, and commenced the litigations, without malice or bad faith, with the belief and understanding that their said patents were valid and their publications and threats warranted by the scope of their patent claims, their trademark registrations for 'Day-Glo,' and the patent and trade-mark laws of the United States." (Finding 20, Appendix C, p. 13.)

The district court issued a broad injunction enjoining Switzers from all conduct which had or might constitute misuse of the '384 and '529 patents and the trademark (Appendix C, pp. 20-22).

Further, in a consent decree entered on October 22, 1953 by the United States District Court in San Francisco, which terminated a government antitrust suit against the Switzers, the two patents held to have been misused in the instant case were effectively sterilized by requiring that Switzers issue unrestricted royalty free licenses under such patents and by enjoining Switzers from instituting any infringement actions under said patents (Paragraph V, Appendix 270-271). Thus, the consent decree terminated the misuse of these two patents as of 1953, seven years before the decree was entered below. The consent decree did not purport to impair Switzers' property rights in the Day-Glo trademark. It did enjoin certain conduct in connection with the use and licensing of the trademark (Appendix 266-279, especially 274-277). Pursuant to the requirements of the decree Switzer gave wide publicity to its provisions (Appendix 285-86). Under paragraph XV of the consent decree the district court retained and still has jurisdiction over the government's suit permitting either party to apply for further orders or amendments as might be appropriate to carry out the final judgment (Appendix 278-279).

REASONS FOR DENYING THE WRIT.

1. The petition does not present an important question of federal law. The decision of the court of appeals affirming the district court merely upholds the well-established principle that the district court enjoys a broad discretion in fashioning remedies for antitrust violations (Opinion, Appendix A, xx-xxi). The district court after lengthy consideration framed a detailed injunction to prevent future violations of the antitrust laws. The court of appeals unanimously held that the decree was adequate for that purpose. The brief of petitioner (hereinafter called "Radiant") erroneously implies that no such injunction was issued by the district court.

2. The district court and the court of appeals properly refused to enjoin further use of the Day-Glo trademark. The court of appeals noted that it had found no Supreme Court decision authorizing the relief requested by Radiant (Appendix A, xx). The court might well have said it could find no authority in any court for such relief. Thus, in *Cott Beverage Corporation v. Canada Dry Ginger Ale*, 146 F. Supp. 300, 302-03 (S. D. N. Y. 1956), appeal dismissed, 243 F. 2d 795 (2d Cir. 1957), and *American TCP Corp. v. Shell Oil Co.*, 123 F. Supp. 155 (S. D. N. Y. 1954) cited by Radiant (petition, p. 6. n. 2), both courts refused to enjoin use of the trademark in issue. The other two cases cited by Radiant in note 2 both involve consent decrees and constitute no authority for Radiant's position. Radiant cites no contested case where an injunction against further use of a trademark was issued. In *Timken Co. v. United States*, 341 U. S. 593 (1951), where a trademark had been used in violation of the antitrust laws, injunction against further use of the misused mark was not even suggested as a remedy.

While Radiant relies on the divestiture cases (where the defendant is recompensed for the loss of its property), it actually seeks not divestiture but the harsh penalty of forfeiture. Without a cent of compensation to its owners the Day-Glo mark would be cast into the public domain for anyone but Switzers to use.* Even in instances where divestiture might be proper this Court has recognized that it is a harsh and unusual remedy and should be sparingly ordered. In the *Timken* case, *supra*, the Court, in reversing an order for divestiture of stock interests in subsidiary corporations, said:

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available * * *. While the decree here does not call for confiscation, it does call for divestiture." 341 U. S. 593 (1951) p. 603.

The decisions of this Court which most nearly approximate the question raised here are not the divestiture cases but those decisions involving decrees ordering compulsory royalty free patent licenses. This Court has twice indicated that such a decree, which amounts to dedication of the patent to the public, should rarely, if ever, be issued. Thus in *Hartford-Empire Co. v. United States*, 323 U. S. 386, 414-17 (1945) this Court reversed such a decree as confiscatory and unwarranted. In *United States v. National Lead Co.*, 332 U. S. 319 (1947), this Court refused a request by the government to amend a district court decree

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* While it is true that a decree could prevent the use of the Day-Glo mark by Radiant as well as by Switzers, such decree could not prevent its use by third persons who are not parties to this action. Thus, the order sought by the petition would inevitably lead to hopeless public confusion over the source of goods bearing the Day-Glo mark.

to require compulsory royalty free patent licenses. Both these decisions have been approved by the Report of the Attorney General's Committee to Study the Antitrust Laws, pp. 255-58.

The restrictions imposed by the present injunction, coupled with those of the consent decree assuring a free market for daylight fluorescent materials, are sufficient answer to Radiant's contention (Petition, p. 7) that Switzers will continue to reap the harvest of its illegal conduct if it retains its rights to the Day-Glo mark.

With respect to Radiant's point 2 under the heading, Reasons for Granting the Writ (Petition pp. 7-8), it would *not* be merely a "slight step forward" to enjoin Switzers from using the trademark. The *Worden* and *Manhattan Medicine* cases, cited by Radiant on page 8 of its petition, are not applicable here. In this case there was no finding, nor indeed any evidence, of misrepresentation as to the nature or of the source of origin of the trademark goods. On the contrary the district court specifically found that Switzers had acted in good faith.

Under point 3 (Petition, p. 9) Radiant argues that the court of appeals unduly limited the rights of private litigants, citing Appendix A, xvix-xx. Radiant misconstrues the thrust of the court's opinion on this issue. The court stressed that the divestiture cases relied on by Radiant involved "conspiratorial combine[s] of giant economic units of industry," as contrasted with Switzers, "a single supplier of fluorescent materials and its officer-stockholders." Clearly the size of the violator and the magnitude of the violation are dominant factors in determining the scope of the relief. The court of appeals was correct when it stated that it "could not require divestiture in the absence of convincing reasons why that remedy is necessary to prevent continued violations of the antitrust laws."

The court found that the district court believed that continued violations could be prevented without forfeiture of the Day-Glo trademark and on this basis properly held that the decree based on such a conclusion was "a valid exercise of the large discretion with which the court was vested."

3. The issue raised by the petition is not an appropriate one for review in this Court. The transcript below ran almost three thousand pages; over four hundred exhibits, some composed of numerous documents, were put in evidence. Without a detailed review of the record it is inconceivable that this Court would hold as a matter of law that the district court abused its discretion by failing to give adequate injunctive relief. This case must be distinguished from the divestiture cases cited by Radiant on page 5, note 1, and on page 8 of its petition. In those cases an appeal was taken directly to this Court without intermediate review by the court of appeals, and necessarily this Court was obliged to examine the record in detail and closely scrutinize the relief granted. See *International Boxing Club v. United States*, 358 U. S. 242, 253 (1959). Here the decree of the district court was carefully considered by the court of appeals and found sufficient.

CONCLUSION.

For the reasons stated above Switzers pray that the petition be denied.

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APPENDIX C.

Findings of Fact and Conclusions of Law.

This matter having come on for trial, and the Court having heard the evidence and having examined and considered the documentary and other exhibits introduced into evidence at the said trial, and the Court having read and fully considered the briefs and arguments respectively submitted by the parties and being fully advised, the Court renders its Findings of Fact and Conclusions of Law as follows:

Findings of Facts.

1. Harry P. Locklin and Elmer J. Brant are co-partners doing business under the firm name and style of Radiant Color Company. They are referred to in these Findings sometimes as Radiant.

2. Switzer Brothers, Inc. is an Ohio corporation, wholly owned by Robert C. Switzer and Joseph L. Switzer. All three defendants are referred to in these Findings sometimes collectively as Switzers.

3. At all times from January 1, 1949 until the present, Radiant and the Switzers have been competitors in the business of manufacturing and selling daylight fluorescent materials. The products of Radiant are called "Velva-Glo" and those of Switzers are called "Day-Glo."

4. Daylight fluorescent materials are commonly understood by those in the trade to include liquid colors, coated paper and cardboard, and pigments which produce brilliant color effects by virtue of the phenomenon of fluorescence in response to the visible light of daylight.

5. The daylight fluorescent materials produced by Radiant and Switzers have been and are being sold in interstate commerce through channels of trade including

sign makers, printers and the like, who use such daylight fluorescent materials to produce completed advertising, signalling, amusement and other novelty devices ornamented or fabricated from such daylight fluorescent materials. Typical examples include billboards, posters, car cards, window banners, window displays, Christmas cards, cut out letters, magazine inserts, and the like. These are called "end-use" devices in these Findings.

6. On January 1, 1949, the date when Radiant began business as a partnership, Switzer Brothers, Inc. was the exclusive licensee of a number of patents and patent applications owned by Robert C. Switzer, Joseph L. Switzer, and their wives, and relating to fluorescent materials and fluorescent end-use devices. These are hereafter referred to as the Switzer patents and applications.

7. Switzer Brothers, Inc. entered into contracts with a number of manufacturers of daylight fluorescent materials licensing them to use the trade-mark "Day-Glo" and the Switzer patents and applications. The manufacturers in turn agreed

(a) that they would sell the daylight fluorescent materials only to licensed dealers and only to licensed end-users, and

(b) that they would produce only Day-Glo products under the license arrangement.

The licensees under such agreements included Sherwin-Williams Company, Lawter Chemicals, Inc., Dennison Manufacturing Company, Mid-States Gummed Paper Company, International Printing Ink Company, and National Card, Mat and Board Company.

8. Under the foregoing arrangement, Switzer Brothers, Inc. and the licensed manufacturers of daylight fluorescent materials entered into contracts with dealers in

daylight fluorescent materials under which they licensed the dealers to sell "Day-Glo" products. Under these agreements, the dealers agreed

(a) that they would deal only in those daylight fluorescent products which carry the trade-mark "Day-Glo" and have been obtained from Switzer Brothers, Inc. or other sources authorized in writing by Switzer Brothers, Inc. to produce Day-Glo materials;

(b) that they would supply Day-Glo materials only to Day-Glo licensees; and

(c) that they would not compete with Day-Glo licensees, with Switzer Brothers, Inc., or with other authorized sources of Day-Glo materials.

9. Under the foregoing arrangements, Switzer Brothers, Inc., as principal, and the licensed manufacturers of, and dealers in, daylight fluorescent materials, as agents, entered into written agreements with manufacturers of end-use devices licensing them under the trade-mark "Day-Glo" and under the Switzer patents and applications. The manufacturers of the end-use devices in turn agreed

(a) that they would use the trade-mark "Day-Glo" on all daylight fluorescent devices manufactured by them, and

(b) that they would obtain their daylight fluorescent materials only from sources "approved in writing" by Switzer Brothers, Inc. to furnish or supply such materials.

10. In addition to the formal end-use licensees referred to in Finding 9, Switzer Brothers, Inc. and its manufacturing licensees named in Finding 7 have sold certain of the daylight fluorescent materials manufactured by them under a label license giving the purchasers of such materials a free royalty-paid license to use such materials only in the manufacture of a device covered by pertinent

Switzer patents and applications. At the beginning, such licenses were issued for non-production uses only. On October 27, 1952, this form of label licensing was extended to fluorescent coated paper, and on October 15, 1953, it was extended to all daylight fluorescent materials.

11. Except as provided in Finding 10, no licenses were granted to any manufacturer of end-use devices other than those patent licenses which are automatically included in the formal end-use licenses referred to in Finding 9.

12. All of such licenses referred to in Findings 7, 9 and 10 included a license under Robert C. Switzer named patent 2,417,384 issued March 11, 1947, for *Daylight Fluorescent Signaling and Display Device*. The Switzers have characterized this patent as the basic patent in daylight fluorescent devices. By its terms it purports to cover "A device for conveying intelligence visually in daylight beyond the range of subtractive color perceptibility" describing its specific ingredients or elements, but it does not purport to cover the daylight fluorescent materials used in making such a device.

13. All of such licenses referred to in Findings 7, 9 and 10 made after July 5, 1949, included a license under Joseph L. Switzer and Robert C. Switzer patent 2,475,529 issued July 5, 1949 for *Fluorescent Device and Method of Making the Same*. The Switzers have characterized this patent as including all daylight fluorescent devices made with poster papers, cotton fabrics, fluorescent coated papers and like supports. By its terms it covers "a fluorescent device for use at a distance from a source of fluoresciginous radiations" describing its specific ingredients and elements, as well as the method of making such a device. None of the claims purports to cover fluorescent materials used in making such a device.

14. The fluorescent materials manufactured by Switzer Brothers, Inc. and its manufacturing licenses named in Finding 7 have substantial non-infringing uses not defined in any of the claims of patents 2,417,384 and 2,475,529.

15. In furtherance of the licensing program, the Switzers, starting early in 1949, charged non-licensees under the "Day-Glo" program and all users of non-licensed displays with infringement of Letters Patent 2,417,384 and 2,475,529 by advertisements and news releases in the trade papers, by letters and by oral communications.

16. In furtherance of the Day-Glo licensing program, Switzers, starting in mid-1949, threatened all non-licensees under the "Day-Glo" program and all users of non-licensed displays with patent infringement suits under Letters Patent 2,417,384 and 2,475,529 by advertisements in the trade papers, by letters and by oral communications.

17. In furtherance of the Day-Glo license program, Switzers commenced patent litigation suits in scattered sections of the country against unlicensed dealers in daylight fluorescent materials, unlicensed manufacturers of end-use devices and users of unlicensed end-use devices.

18. In furtherance of the Day-Glo licensing program, Switzers instituted actions for alleged patent infringements against customers of Radiant Color Company, one such action being the instant action in which complaint was filed on June 5, 1952, and another action being an action filed in the United States District Court for the Northern District of Ohio, Eastern Division, on September 19, 1953, as Civil Action No. 29,975, in which the parties plaintiff were Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, and the defendant was James P.

Byrne, doing business as Byrne Wallpaper and Paint Stores. Switzer Brothers, Inc., among other things, intended thereby to deter customers and prospective customers of Radiant Color Company from purchasing fluorescent materials produced by Radiant Color Company.

19. The publications and threats were, at least in part, unwarranted in fact because the Switzer patents did not purport to cover the broad field of daylight fluorescent displays for which claim was made in the publications.

20. Switzers made the publications and threats, and commenced the litigations, without malice or bad faith, with the belief and understanding that their said patents were valid and their publications and threats warranted by the scope of their patent claims, their trademark registrations for "Day-Glo," and the patent and trade-mark laws of the United States.

21. Notwithstanding the matters in Finding 20,

(a) the publications were excessive;

(b) Switzers should have known that the publications were excessive; and

(c) the publications were not followed promptly by litigation against all those to whom they were directed.

22. The parties have submitted substantial probative evidence concerning the prior state of the art with which we are here concerned. Although such evidence appears sufficient to permit findings concerning anticipation of the instant patent claims by the prior art, the parties have agreed in open court that the issues of patent validity and infringement are not before this Court. Such agreement may well have been motivated by *Switzer Brothers, Inc. v. Chicago Cardboard Co.*, 252 F. 2d 407 (C. A. 7, 1958), which held that the infringement issue was not properly

before the Court in this case, and *Texas-Miller Hat Corp. v. Switzer Bros.*, 201 F. 2d 824 (C. A. 5, 1953), certiorari denied 346 U. S. 821, which held that two patents, including the Switzer "basic patent" number 2,417,384, were invalid. Although the briefs include arguments directed to the issues of patent validity and infringement, the Court adheres to the said stipulation and, therefore, makes no findings concerning patent validity or infringement.

23. The Switzer agreements referred to in Findings 7, 8, 9 and 10 have had, and are still having, the effect of substantially lessening competition and have tended, and are still tending, to create a monopoly in daylight fluorescent materials.

24. The Switzer program resulted in a combination which included Switzer Brothers, Inc., as well as at least eight other manufacturers of daylight fluorescent materials; dealers in daylight fluorescent materials in all parts of the United States; and more than 4,000 licensed manufacturers of "Day-Glo" end-use devices; all of whom were forbidden to deal in unauthorized daylight fluorescent materials.

25. While this program was in effect, Switzer Brothers, Inc., alone, built up a market of over $500,000 per annum in the sale of daylight fluorescent materials.

26. Radiant Color Company was within the target area of the Switzer licensing, publicity and litigation program. Licensees were advised that Velva-Glo materials were unapproved; licensees and others were advised that Velva-Glo materials were infringements; customers of Radiant were threatened with suit; and finally customers of Radiant were actually sued by the Switzers.

27. Robert C. Switzer and Joseph L. Switzer each participated in the acts of which Radiant has complained in that:

(a) Robert C. Switzer and Joseph L. Switzer, at least as late as December 16, 1955, were the owners of an undivided ¾th interest, as tenants in common, of patents 2,417,384 and 2,475,529 and of the applications upon which said patents were issued and their wives, Patricia Switzer and Elise deGroot Switzer, were the owners of the remaining undivided ¼th interest of said patents;

(b) Robert C. Switzer and Joseph L. Switzer, together with their wives, Patricia Switzer and Elise deGroot Switzer, licensed Switzer Brothers, Inc., under patents 2,417,384 and 2,475,529 and authorized Switzer Brothers, Inc. and third persons to execute the licenses referred to in Findings 7, 8, 9 and 10.

(c) Robert C. Switzer and Joseph L. Switzer were the sole stockholders of Switzer Brothers, Inc. and were officers and directors of Switzer Brothers, Inc. at all times since prior to January 1, 1949;

(d) Robert C. Switzer and Joseph L. Switzer authorized, directed and/or did some of the acts contributing in whole or in part to the matters found above;

(e) Robert C. Switzer and Joseph L. Switzer authorized Switzer Brothers, Inc., to commence the patent infringement actions referred to above and agreed, together with their wives, to pay Switzer Brothers, Inc. the reasonable expenses incurred by it in prosecuting said litigation;

(f) Robert C. Switzer and Joseph L. Switzer availed themselves of the fruits of the aforesaid conduct of Switzer Brothers, Inc. in that Robert C. Switzer and Joseph L. Switzer received royalty payments from Switzer Brothers, Inc. both under its license and under sublicenses granted by Switzer Brothers, Inc. as found in Findings 7 and 9 above, and in that they both received dividends from Switzer Brothers, Inc, accruing in part from profits made by Switzer Brothers, Inc. and arising from the acts as found herein.

28. The foregoing conduct of Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer has damaged the public in general:

(a) by depriving individual members of the public of their right to purchase unpatented fluorescent materials in a free, competitive, unrestricted market; and

(b) by coercing individual members of the public to purchase "Day-Glo" fluorescent materials instead of the fluorescent materials produced by others.

29. Radiant Color Company has been directly damaged by the Switzer license program in the respects noted in Findings 30 to 34 below, and possibly in others.

30. Commencing in 1950 and continuing until late in 1953, Radiant was put to expense in counteracting the Switzer propaganda and in reassuring dealers and customers that the Switzer program could not prevent the use of Radiant's products.

31. Commencing on June 5, 1952 and continuing until February 11, 1958, Radiant was put to the expense of defending its customer, Chicago Cardboard Company, by virtue of the complaint filed in this action.

32. Commencing on February 9, 1953 and continuing until April 8, 1957, Radiant was put to the expense of defending its customer, James P. Byrne, in the Northern District of Ohio, Eastern Division.

33. Commencing shortly after June 5, 1952, Radiant's market in Velva-Glo paper became depressed due, at least in part, to the commencement of the instant action, and Radiant has lost profits which it would otherwise have made.

34. Commencing shortly after February 9, 1953, Radiant's market in Velva-Glo silk screen colors became

depressed due, at least in part, to the commencement of the Cleveland suit, and Radiant has lost profits which it would otherwise have made.

35. The record does not disclose the dollar value of the damages enumerated in Findings 28 to 32 above, thereby making an accounting the only appropriate procedure for ascertaining the dollar extent of such damages.

36. Switzers have introduced no evidence in support of paragraphs 19, 20, 21 and 22 of their counteraction against Radiant.

37. Unless injunctive relief is granted in this action, Radiant Color Company will sustain further and additional damages by virtue of the aforesaid continuing violation of the antitrust laws.

Conclusions of Law.

1. The Court has jurisdiction over the parties to this litigation and over the subject matter thereof.

2. Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, have misused Switzer patents 2,417,384 and 2,475,529, as well as the Day-Glo trademarks, in restraint of trade between the states and in a way tending to create a monopoly in unpatented daylight fluorescent materials in part

(a) by granting the exclusive right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc., and in part

(b) by granting a preferential right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent

materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc.,

and have thereby violated the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14.

3. Radiant Color Company is entitled to a writ of injunction to be issued out of and under the seal of this Court perpetually restraining and enjoining said Switzer Brothers, Inc., Robert C. Switzer, Joseph L. Switzer, the officers of Switzer Brothers, Inc., their agents, employees, attorneys, and all persons acting on behalf of any of them

(a) from granting any license to use the combination claimed by said Switzer patents 2,417,384 and 2,475,529, where such licensed use is directly or indirectly conditioned on purchasing or otherwise obtaining only from Switzer Brothers, Inc., or from sources designated by it, any daylight fluorescent materials to be used in such combination, but not patented by such patents;

(b) from selling or offering to sell any daylight fluorescent materials, with an undertaking or understanding that the purchaser will be granted the right to use the combination claimed in said Switzer patents on conditions that such daylight fluorescent materials, unpatented with respect to said patents, shall be purchased only from Switzer Brothers, Inc., or from a source designated by it;

(c) from in any way discriminating, in the granting of licenses to use the combination claimed in said Switzer patents, in favor of users or proposed users of such combination who purchase daylight fluorescent materials therefor from Switzer Brothers, Inc., or from a source designated by it, and against such users or proposed users who purchase such daylight fluorescent materials from any other source;

(d) from so using said Switzer patents as to tend to create a monopoly in daylight fluorescent materials not patented by such patents, or in any way, directly or indirectly, misusing such patents in violation of the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14.

(e) from bringing suit against or in any way threatening the customers of Radiant Color Company with suits for alleged infringement of said Switzer patents on account of the sale and use of daylight fluorescent materials which have been obtained from Radiant Color Company and are not embraced by the claims of said patents.

(f) from making representations that the Switzer patents cover fluorescent materials produced by Radiant Color Company, or devices made from such materials, which are not embraced by the claims of said patents.

4. Radiant Color Company is entitled to have this cause referred to a special master to ascertain, take, state, and report on account of the damages suffered, and costs expended by Radiant Color Company and the amount of reasonable attorneys' fees.

5. Radiant Color Company is entitled to a judgment dismissing the Counter-claim against Intervenors filed by Switzer Brothers, Inc., Robert C. Switzer, and Joseph L. Switzer.

6. The amount allowable to Radiant Color Company by reason of its damages sustained and costs expended, and the matter of costs on accounting, shall await the further order of this Court.

J. H. MINER.

Judgment.

This matter having come on for trial, and the Court having heard the evidence and having examined and considered the documentary and other exhibits introduced into evidence at the said trial, and the Court having read and fully considered the briefs and arguments respectively submitted by the parties and being fully advised, and the Court having entered its Findings of Fact and Conclusions of Law;

IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. The Court has jurisdiction over the parties to this litigation and over the subject matter thereof.

2. Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, have misused Switzer patents 2,417,384 and 2,475,529, as well as the Day-Glo trademarks, in restraint of trade between the states and in a way tending to create a monopoly in unpatented daylight fluorescent materials in part

(a) by granting the exclusive right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc., and in part

(b) by granting a preferential right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc.,

and have thereby violated the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14.

3. A writ of injunction shall issue out of and under the Seal of this Court perpetually restraining and enjoin-

ing said Switzer Brothers, Inc., Robert C. Switzer, Joseph L. Switzer, the officers of Switzer Brothers, Inc., their agents, employees, attorneys, and all persons acting on behalf of any of them,

(a) from granting any license to use the combination claimed by said Switzer patents 2,417,384 and 2,475,529, where such licensed use is directly or indirectly conditioned on purchasing or otherwise obtaining only from Switzer Brothers, Inc., or from sources designated by it, any daylight fluorescent materials to be used in such combination, but not patented by such patents;

(b) from selling or offering to sell any daylight fluorescent materials, with an undertaking or understanding that the purchaser will be granted the right to use the combination claimed in said Switzer patents on condition that such daylight fluorescent materials, unpatented with respect to said patents, shall be purchased only from Switzer Brothers, Inc., or from a source designated by it;

(c) from in any way discriminating in the granting of licenses to use the combination claimed in said Switzer patents, in favor of users or proposed users of such combination who purchase daylight fluorescent materials therefor from Switzer Brothers, Inc., or from a source designated by it, and against such users or proposed users who purchase such daylight fluorescent materials from any other source;

(d) from so using said Switzer patents as to tend to create a monopoly in daylight fluorescent materials not patented by such patents, or in any way, directly or indirectly, misusing such patents in violation of the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14;

(e) from bringing suit against or in any way threatening the customers of Radiant Color Company with suits for alleged infringement of said Switzer

patents on account of the sale and use of daylight fluorescent materials which have been obtained from Radiant Color Company and are not embraced by the claims of said patents;

(f) from making representations that the Switzer patents cover fluorescent materials produced by Radiant Color Company, or devices made from such materials, which are not embraced by the claims of said patents.

4. This cause shall be referred to a special master to ascertain, take, state, and report an account of the damges suffered, and costs expended, by Radiant Color Company and the amount of reasonable attorneys' fees; and

(a) Radiant Color Company on such accounting shall have the right to cause the examination of the officers, servants, and employees of Switzer Brothers, Inc., Robert C. Switzer, and Joseph L. Switzer, orally or otherwise, and to examine other witnesses, and to cause the production and examination of the pertinent books, vouchers, records and documents of said Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, and to have all necessary process of the Court to compel such attendance and production before the said master, at such times and places as he shall direct; and

(b) Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, on such accounting shall have the right to cause the examination of the officers, servants, and employees of Radiant Color Company, orally or otherwise, and to examine other witnesses, and to cause the production and examination of the pertinent books, vouchers, records and documents of said Radiant Color Company, and to have all necessary process of the Court to compel such attendance and production before the said master, at such times and places as he shall direct.

5. The Counter-claim against Intervenors filed by Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, is hereby dismissed.

6. The amount allowable to Radiant Color Company by reason of its damages sustained and costs expended, and the matter of costs on accounting shall await the further order of this Court.

7. The parties shall appear before this Court on September 19, 1960, at which time the Court will hear any motions the parties may desire to submit, and the matter of the person of the special master shall be determined.

J. H. MINER.